

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MARLEEN M. LAPLANT, on her own behalf
and on behalf of a class similarly situated,

Plaintiffs,

vs. Case No. 2:11-CV-00910

THE NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY, a
Wisconsin Mutual Insurance Corporation,

Defendant.

VIDEOTAPED DEPOSITION OF ROBERT L. HOYER

Friday, May 17th, 2013

9:00 a.m.

at

QUARLES & BRADY, LLP
411 East Wisconsin Avenue
Milwaukee, Wisconsin

Reported by Carla J. Miller, RPR, CRR

Videotaped Deposition of ROBERT L. HOYER, a
witness in the above-entitled action, taken at the
instance of the Defendants, pursuant to the rules of
Federal Civil Procedure, pursuant to Notice of
Deposition, before Carla J. Miller, Registered
Professional Reporter and Certified Realtime
Reporter, in and for the State of Wisconsin, at
QUARLES & BRADY, LLP, 411 East Wisconsin Avenue,
Milwaukee, Wisconsin, on the 17th day of May, 2013,
commencing at 9:00 a.m. and concluding at 3:58 p.m.

A P P E A R A N C E S:

KERSTEN & MCKINNON, S.C., by
MR. GEORGE P. KERSTEN and
E. CAMPION KERSTEN
11518 North Port Washington Road, Suite 104
Mequon, Wisconsin, 53092
Appeared on behalf of the Plaintiffs

BARTLIT BECK HERMAN PALENCHAR & SCOTT, by
MR. SEAN C. GRIMSLEY and MR. ADAM HOEFELICH
1899 Wynkoop Street
Denver, Colorado, 80202
Appeared on behalf of the Defendants

NORTHWESTERN MUTUAL, by
MR. RODD SCHNEIDER
720 East Wisconsin Avenue
Milwaukee, Wisconsin, 53202

ALSO PRESENT: Mr. Mark Lyle, Ryker & Lyle Legal
Video Service

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T R A N S C R I P T O F P R O C E E D I N G S

THE VIDEOGRAPHER: We are on the record.

This is the beginning of disk one of the deposition of Robert Hoyer. It's being taken at the instance of the Defendants in the matter of Marleen LaPlant versus Northwestern Mutual Company -- Northwestern Mutual Insurance Company.

The case is pending in the U.S. District Court, Eastern District of Wisconsin, No. 11-CV-910.

Today we're at the offices of Quarles & Brady, 411 East Wisconsin Avenue, Milwaukee Wisconsin. Today's date, May 17th, 2013. The time, 9:07 a.m.

My name is Mark Lyle, today's videographer with Ryker & Lyle Legal Video Service, and the court reporter is Carla Miller, and we're here on behalf of Gramann Reporting.

First we will have counsel introduce themselves and state who they represent, and then the court reporter will swear in the witness. We will begin with the Plaintiff, please.

MR. KERSTEN: For the Plaintiff, George Kersten and Campion Kersten of Kersten & McKinna for the Plaintiffs.

MR. GRIMSLEY: For Northwestern Mutual, Sean Grimsley and Adam Hoefflich of Bartlit Beck, and we also have Rodd Schneider of Northwestern Mutual.

WHEREUPON,

ROBERT L. HOYER

Called for examination by and on behalf of the Defendants, being first duly sworn, was examined and testified as follows:

E X A M I N A T I O N

BY MR. GRIMSLEY:

Q Good morning, Mr. Hoyer.

A Good morning.

Q Do you recall that you were deposed previously in the LaPlant matter?

A I was deposed on this case. I'm not sure precisely it was LaPlant. There's been a couple of different cases.

MR. KERSTEN: Before we begin with the substance of the deposition, I would like the record to show that we were not given notice of the videotaping of this deposition. And I believe we should go ahead with the videotape, but we reserve the right to its use. We want to reflect on whether or not it is usable, but I think we should go ahead and we will just reserve our right to object to the

use of the video.

MR. GRIMSLEY: It was my understanding that in this case the parties have been using a relatively informal method of noticing depositions, including just sending emails without an actual notice, but we can obviously take this issue up at a later time. I appreciate that you will let it go forward with the videotape.

MR. KERSTEN: Fine. Let's do that. Just to let you know, I think generally, at least we have followed the practice, that if something is going to be videotaped, if a deposition is going to be videotaped, we generally gave notice of that. I don't know of any exceptions to that, but we can talk about that later.

BY MR. GRIMSLEY:

Q Well, you put on a suit today, haven't you, sir?

A Yes, I have.

Q Is there any way differently you would have dressed had you known this would have been on videotape today?

A No.

Q Is there anything differently you would have done to prepare had you known this was going to be on videotape today?

A No.

Q You do recall having a deposition in Milwaukee at some point in time in this matter?

A Yes, sir.

Q Did you review that deposition transcript?

A At the time I did, yes, sir.

Q Did you find anything in that deposition transcript that you disagreed with?

A No, sir.

Q Since that time have you thought of anything in that deposition transcript that you disagree with?

MR. KERSTEN: Object as irrelevant.

THE WITNESS: I have not thought of that deposition in some time.

BY MR. GRIMSLEY:

Q But there is nothing, then, today that you can think of specifically that you would disagree with in your prior deposition?

MR. KERSTEN: Same objection.

THE WITNESS: On a different matter than the basis for today's report, there is nothing that comes to mind.

BY MR. GRIMSLEY:

Q Is there anything regarding the basis of the report we're going to be talking about today that you can

think of that was incorrect about your prior deposition?

A No, sir.

(Deposition Exhibit No. 1-2 were marked for identification.)

BY MR. GRIMSLEY:

Q I'm going to show you what's being marked as Hoyer Deposition [Exhibit 1](#) and Hoyer Deposition [Exhibit 2](#). Let me just give copies to counsel.

Do you recognize Hoyer Deposition

[Exhibit 1](#)?

A Yes, sir.

Q What is that?

A That is a bill that I sent in this matter.

Q This is a bill for the work that you did in preparing the report that you served on March 4th, 2013?

A Yes, sir.

Q It says that you spent 44.5 hours on that report.

A That is correct.

Q Is that the sum total of time that you spent on preparing the March 4th, 2013 report?

A Yes, sir.

Q When did you start working on the March 4th, 2013 report?

A I don't recall specifically, but it was approximately

1 February 1, thereabouts.
 2 Q So the work you did would have principally been in
 3 February of 2013?
 4 A Certainly in the beginning of March.
 5 Q Nothing, though, that you can think of before
 6 February 1st, 2013?
 7 A Well, I have worked on this case prior to that, and
 8 certainly my cumulative knowledge and reviewing of
 9 documents was encompassed within this final -- this
 10 report.
 11 Q But with regard to actually preparing the report,
 12 your work began in February of 2013?
 13 A New work specifically designed or directed towards
 14 this report began at that time.
 15 Q You work for Hoyer Actuarial Litigation, LLC?
 16 A Yes, sir.
 17 Q Are you the only employee of Hoyer Actuarial
 18 Litigation, LLC?
 19 A I'm the principal and the only employee, if you use
 20 that term.
 21 Q Are there any other employees at Hoyer Actuarial
 22 Litigation, LLC that are paid by that entity besides
 23 you?
 24 A Paid by that entity. From time to time on various
 25 cases I have used subcontractors to augment the work

1 that I do.
 2 Q Have you used subcontractors in this case?
 3 A I'm not sure how you would describe, Nathan
 4 Associates worked with me. They were not a
 5 subcontractor to me because they were not paid by me
 6 so I'm not sure how you're using that term
 7 "subcontractor."
 8 Q Do all funds that are paid to Hoyer Actuarial
 9 Litigation, LLC go to you after cost and expenses are
 10 paid?
 11 A Yes, sir.
 12 Q You mentioned Nathan Associates. Please look at
 13 Hoyer Deposition [Exhibit 2](#). What is Hoyer Deposition
 14 [Exhibit 2](#)?
 15 A I have not seen this document prior to you handing it
 16 to me.
 17 Q Okay. Who is Nathan Associates?
 18 A They are an economic consulting firm that does work
 19 in computer area.
 20 Q Did individuals at Nathan Associates assist you in
 21 preparing the May 4th, 2013 report?
 22 A They did various work at my direction, yes, sir.
 23 Q And just looking at the hours, I don't want to ask
 24 you about what type of work they actually did, but
 25 just looking at the hours, does this to your mind

1 accurately reflect the number of hours that was spent
 2 by individuals at Nathan Associates on the March 4th,
 3 2013 report?
 4 A I have no idea how many hours they spent. I have not
 5 seen this report prior and I did not control their
 6 hours.
 7 Q Who to your knowledge controlled their hours?
 8 A I know other individuals who were involved, but I'm
 9 not sure how to answer that question because I'm
 10 not -- I'm not sure how that exactly worked.
 11 Q Look back at Deposition [Exhibit 1](#). You will notice
 12 that -- It's on Page 2. It says, "Billing for
 13 actuarial services in connection with the dispute
 14 Krueger versus Northwestern Mutual Life Insurance
 15 Company."
 16 A Yes, sir.
 17 Q You are aware that the case that we are sitting and
 18 discussing today is the LaPlant matter in Wisconsin?
 19 A That's correct. Krueger is a misnomer in this case.
 20 Q So you did bill separately for the Krueger case
 21 versus the LaPlant case?
 22 A I have been involved in that case as well.
 23 Q But do you bill separately for those two cases?
 24 A Well, I bill for the work that I do. And if it was
 25 on a different case, I would bill separately for

1 that.
 2 MR. KERSTEN: Counsel, if it helps, we will
 3 stipulate that's a typo.
 4 MR. GRIMSLEY: That's fine. I just wanted
 5 to know if there was some umbrella name under which
 6 he's billing rather than billing by case.
 7 MR. KERSTEN: No. No, that's just a typo
 8 apparently. That's my understanding.
 9 BY MR. GRIMSLEY:
 10 Q All said, how much has Hoyer Actuarial Litigation,
 11 LLC been paid for its work for plaintiffs' attorneys
 12 on matters involving Pre-MN annuities and Northwest
 13 Mutual?
 14 A Offhand I have no idea because we're talking over a
 15 period of several years.
 16 Q This is the only case that you have actually
 17 testified in in the last five years?
 18 A Yes, sir.
 19 Q But you have no idea how much money roughly you would
 20 have made from these cases?
 21 A I'm not sure because of the duration involved.
 22 Q What percentage of Hoyer Actuarial Litigation's fees
 23 over the past five years have been from cases related
 24 to Pre-MN annuities and Northwestern Mutual?
 25 A A small percentage.

1 Q Give me a rough idea.

2 A I don't recall precisely or even approximately how

3 much my total billings on this -- these related cases

4 have been, so it's very difficult for me to estimate

5 how much of that is relative to my total billings. I

6 would have to go do an analysis to get you a

7 legitimate answer.

8 Q Has it been, just rough ballpark, 5 percent,

9 10 percent, 15 percent?

10 A In that range.

11 Q 10 percent then is a fair --

12 MR. KERSTEN: Objection as repetitious.

13 THE WITNESS: I say I do not know, I

14 haven't done that analysis, but that is a ballpark

15 rough estimate.

16 BY MR. GRIMSLEY:

17 Q How much does Hoyer Actuarial Litigation make per

18 year roughly?

19 MR. KERSTEN: Objection as irrelevant.

20 THE WITNESS: Since I do consulting work,

21 it varies considerably from year to year.

22 BY MR. GRIMSLEY:

23 Q How much did Hoyer Actuarial Litigation make last

24 year?

25 MR. KERSTEN: Same objection.

1 THE WITNESS: Yeah, I don't know.

2 BY MR. GRIMSLEY:

3 Q You have no idea?

4 A I have -- Only ballpark.

5 Q We just had tax season. You have no idea?

6 A I don't know, 100,000. I'm retired.

7 (Deposition Exhibit No. 3 was marked for

8 identification.)

9 BY MR. GRIMSLEY:

10 Q I'm going to hand you what has been marked as

11 Deposition Exhibit 3. You will see that this is a

12 report from you dated March 4th, 2013; is that

13 correct?

14 A Yes, sir.

15 Q Please look that over and let me know if this is the

16 March 4th, 2013 report that you prepared on behalf of

17 Plaintiffs' counsel in this case.

18 A It appears to be.

19 Q Please go to Page 2 of the report.

20 A (Witness complies.)

21 Q Paragraph 6. And it lists -- And it says there, "The

22 attorneys for the Plaintiffs in this case have asked

23 me the following." Do you see that?

24 A Yes, sir.

25 Q And then there are three bullet points there.

1 A Yes, sir.

2 Q That was the assignment that you were provided for

3 this report?

4 A That was the assignment I was provided for this

5 report, yes, sir.

6 Q Do these three items accurately represent your entire

7 assignment for this report?

8 A Yes, sir.

9 Q This was everything you were asked to do?

10 A That is correct.

11 Q Did you do anything beyond answering these three

12 particular questions for purposes of putting together

13 this report?

14 A It's difficult for me to answer that question because

15 I'm not sure how you mean that. Certainly in

16 answering these three questions, as I proceeded with

17 my work towards these three questions, I made

18 observations based on information and conveyed them

19 to counsel.

20 Q But these three items were your assignment in the

21 case?

22 A Yes, sir.

23 Q Now, I don't see anything in these three bullet

24 points about damages. Were you asked to calculate

25 what the damages would be in this case?

1 A "Damages" can be defined as a legal term. Are you

2 using that as a legal term?

3 Q Yes.

4 A Well, I'm not an attorney, so I'm -- I have no

5 opinion as to the legalese of "damages." I can talk

6 to damages if you're using the definition from a

7 dictionary.

8 Q Did you in any way attempt to fit what you were doing

9 in this report to any sort of legal definition of

10 damages?

11 A No, sir, I did not.

12 Q Were you asked to do that by Plaintiffs' counsel?

13 A No, they did not. If they did, I would say I'm not

14 an attorney.

15 Q Did you do anything in this report to attempt to

16 calculate what punitive damages might be in this

17 case?

18 A Now, that term is not used in this report and I did

19 no analysis in that direction.

20 Q Did you do anything to determine what type of

21 interest rates might apply to any sort of judgment in

22 this case?

23 A Again, that's not --

24 MR. KERSTEN: Objection -- Excuse me. I

25 want to object on the grounds that it is ambiguous as

1 to whether you mean pre-judgment or post-judgment
2 interest.
3 BY MR. GRIMSLEY:
4 Q Sir, did you do anything with regard to calculating
5 interest as to any judgment, whether it's
6 pre-judgment or post-judgment in this case?
7 A That was not included in Paragraph 6 and I did not do
8 any such analysis.
9 Q In your analysis, did you take into consideration the
10 potential impact of any statutes of limitations in
11 this case?
12 A For purposes of this report I did not.
13 Q Were you asked to do so by any of the lawyers?
14 A Again, I'm not an attorney. If they asked me to
15 review statutes of limitations, I would say that's
16 beyond my scope and capability, but I did not in this
17 instance.
18 Q Did the lawyers provide you any assumptions that you
19 should make with regard to statutes of limitations?
20 MR. KERSTEN: Objection as irrelevant.
21 THE WITNESS: No, that -- that never
22 surfaced in our discussions.
23 BY MR. GRIMSLEY:
24 Q Did the lawyers for Plaintiffs ask you to assume
25 anything about the impact that various state laws

1 might have on your calculations?
2 MR. KERSTEN: Same objection.
3 THE WITNESS: No, I -- they did not specify
4 such.
5 BY MR. GRIMSLEY:
6 Q You did not, in fact, take into account the impact
7 that different state laws might have on your opinion?
8 MR. KERSTEN: Same objection.
9 THE WITNESS: No, I did not, and I do not
10 think that's -- impacts my analysis in any way.
11 BY MR. GRIMSLEY:
12 Q You have not provided in this report a basis for
13 determining punitive damages on a class-wide basis
14 using common proof, have you?
15 A That term "punitive damages" is not mentioned in my
16 report. And your last part of your question appears
17 to be another legal term which, again, is not part of
18 my analysis.
19 Q Well, you were asked to determine what the
20 accumulated difference was on policies on a
21 class-wide basis; correct?
22 A On both a class-wide basis and an individual basis,
23 yes, sir.
24 Q Now I'm asking about punitive damages then. You have
25 not done anything to calculate what punitive damages

1 might look like on a class-wide or individual basis?
2 A It's not mentioned here, I was not asked it, and I
3 render no opinion in that regard.
4 Q Okay. You don't know, in fact, how somebody would go
5 about determining punitive damages on a class-wide
6 basis, do you?
7 A I'm not an attorney, I have no opinion.
8 Q I want to look at the first bullet point in Paragraph
9 6. It says, "To describe a reasonable methodology
10 that would provide the basis for prospective relief
11 for current Pre-MN annuity policyholders." What do
12 you mean by "prospective relief"?
13 A Prospective relief as I have analyzed it and as I
14 discussed with counsel, in my opinion, takes two
15 forms: A difference to date for those individuals
16 that are remaining in force and fair and equitable
17 treatment of those individuals prospectively from
18 point of that adjustment.
19 Q "Prospective relief" is, to your understanding, a
20 legal term?
21 A To my understanding I am using it as a dictionary
22 term.
23 Q Okay. You said that part of the prospective relief
24 for in-force policyholders would be payment based on
25 past accumulated differences?

1 A Would be a current payment based on historical
2 activity, so that would be what I would consider to
3 be the first part of prospective relief for those
4 policyholders.
5 Q How is that prospective relief if you're paying money
6 into an account based on things that have happened in
7 the past?
8 A Because it's only the first part of prospective
9 relief, and the second part is in fact into the
10 future and what would be fair and equitable
11 thereafter, so it's a part of.
12 Q Wouldn't it be --
13 A You cannot give prospective relief until a proper
14 reflection of past differences is done.
15 Q But part of that prospective relief would, in fact,
16 be retrospective in nature?
17 A It would be current in nature.
18 Q It would be based on things that happened in the past
19 and there would be money provided by Northwestern
20 Mutual to an account based on things that happened in
21 the past?
22 A It would be current adjustment based on historical
23 activity, yes, sir.
24 Q Is that damages?
25 A In my dictionary term, it's certainly a part of what

1 I would consider damages. You have brought up that
 2 term as a legal term. I have no opinion as to how
 3 that fits your legal definition.
 4 Q With regard to the prospective aspect of this relief,
 5 which would involve paying up additional money in the
 6 future to match the life rate DIR, what would happen
 7 in the future if the Pre-MN annuity rate in the
 8 actual world exceeded the life DIR?
 9 MR. KERSTEN: Object as to the ambiguity of
 10 that question.
 11 THE WITNESS: I'm not sure what you have
 12 asked. I just don't understand what you're saying.
 13 BY MR. GRIMSLEY:
 14 Q You understand that you have in your report put
 15 forward something called a but-for DIR?
 16 A Yes, sir.
 17 Q And the but-for DIR in your report is the DIR you say
 18 should have applied if -- to Pre-MN annuities if
 19 Northwestern Mutual had not made the 1985 change?
 20 A That is correct.
 21 Q We also have the Pre-MN annuity DIR in the actual
 22 world, don't we? Meaning the Pre-MN annuity DIR in
 23 the world where the 1985 change occurred?
 24 A Yes, sir, we do.
 25 Q What if in the future the Pre-MN annuity DIR in the

1 actual world with a segmented account actually were
 2 to surpass or be higher than the life rate DIR in the
 3 actual world --
 4 MR. KERSTEN: Objection --
 5 BY MR. GRIMSLEY:
 6 Q -- how would the prospective relief work in that
 7 situation?
 8 MR. KERSTEN: Objection as without
 9 foundation.
 10 THE WITNESS: Well, I think that's a
 11 hypothetical question, because what I'm saying in my
 12 report is that fair and equitable treatment of these
 13 policyholders would put them on the basis of
 14 dividends which result from an aggregate portfolio
 15 approach to investments. And if that were the case,
 16 I'm not sure how that hypothetical could exist.
 17 BY MR. GRIMSLEY:
 18 Q Well, let's say there is a world in which say in 2015
 19 short-term interest rates once again invert and
 20 overtake long-term investment rates such that in the
 21 actual world in 2015 the Pre-MN annuity holder is
 22 actually better off with the Pre-MN annuity rate than
 23 with the life rate.
 24 MR. KERSTEN: Objection as to the --
 25 BY MR. GRIMSLEY:

1 Q What would you do in that situation with your
 2 prospective relief?
 3 MR. KERSTEN: Objection, the question is
 4 self-contradictory and ambiguous.
 5 MR. GRIMSLEY: It's not self-contradictory.
 6 MR. KERSTEN: I believe it is.
 7 THE WITNESS: I think I understand your
 8 question, but I -- Again, the reason why I'm having a
 9 little trouble with it is simply that I am saying
 10 that there would not be or should not be a segregated
 11 portfolio that without the '85 change all
 12 policyholders, life and annuity and Pre-MN annuity,
 13 would be treated as a singular portfolio investment
 14 pot. So what you're saying is if sometime in the
 15 future a short-term yield -- Well, there wouldn't be
 16 a short-term yield relative to Pre-MN annuitants.
 17 They would be put in the aggregate yield, the
 18 portfolio yield of the company, so I -- it's possible
 19 that an inversion curve could happen in the future,
 20 but I don't think Pre-MN annuitants would be in that
 21 segregated account prospectively.
 22 BY MR. GRIMSLEY:
 23 Q So I want to understand how your prospective relief
 24 would actually work mechanically. I understood that
 25 you were opining that each year there would be an

1 adjustment to the Pre-MN annuity DIR to bring it up
 2 to or down to the life DIR; is that correct?
 3 A No, that is not what I'm saying.
 4 Q Are you saying that there would no longer be any
 5 segmentation going forward and everybody would then
 6 be in the same pot?
 7 A Well, if the court were to say that this is an
 8 appropriate prospective relief, it would be as-if, so
 9 there would be no basis to maintain a segregated
 10 account if the Court directs the company to utilize
 11 an overall portfolio rate, so it's a hypothetical
 12 that does not exist.
 13 Q But you can imagine that there might be situations in
 14 the future where annuity policyholders might be
 15 better off under the segmented portfolio rate than
 16 under the life rate; correct?
 17 MR. KERSTEN: Objection as without
 18 foundation.
 19 THE WITNESS: No, I don't believe that
 20 could happen.
 21 BY MR. GRIMSLEY:
 22 Q You don't believe there may never be an inverted
 23 yield curve again?
 24 A That's not what I said. I said the prospective
 25 relief, as I described here, which is two part, the

determination of a current adjustment and a prospective dividend interest rate based on portfolio yield in combination, that being prospective relief, will always, always be better for Pre-MN annuitants than where they -- the way they have been treated and using a segregated account in the future.

Q Even if the segregated account in the future would in fact make more money than the non-segregated account?

A It would never make a greater difference than the prospective relief that I have described here.

Q So you are saying in the actual world, the current world, where the 1985 change took place, there is never a point in the future where the Pre-MN annuity might do better than the general portfolio?

A That the prospective relief that I have described here, which is made up of two parts, an adjustment based on -- a current adjustment based on historical values plus prospective dividend interest rates based on a portfolio yield, that that in combination will always, always, always overcome a momentarily inversion curve possibly at some time in the future.

Q You can't predict what's going to happen with interest rates in the future, can you, sir?

A No one can. However, if one were to look at Northwestern's annual reports, they certainly purport

to indicate that policyholders will be treated better or better off using various terms under the investment portfolio that they have utilized. So they, in fact, do exactly what you're saying.

MR. GRIMSLEY: Move to strike after "however."

BY MR. GRIMSLEY:

Q Sir, you cannot yourself predict what's going to happen with interest rates in the future, can you?

A I cannot.

Q If you could do that you would be incredibly wealthy; wouldn't you, sir?

A I'm not sure.

Q If you could predict them accurately?

MR. KERSTEN: Counsel, what's the point of this question?

MR. GRIMSLEY: Objection to form is --

MR. KERSTEN: I object as to form. I don't think it's appropriate.

THE WITNESS: I don't know. I'm not sure.

BY MR. GRIMSLEY:

Q But you're not incredibly wealthy, are you, sir?

MR. KERSTEN: Objection as irrelevant. You don't have to give your personal -- you don't have to give your personal financial statement unless,

counsel, you have got some basis that you can tell me about that it permits you to inquire as to his personal finances. Do you have such a basis or don't you?

MR. GRIMSLEY: Are you going to instruct him not to answer?

MR. KERSTEN: No, I'm going to ask you to desist from irrelevant questions. And if you have a basis, I would like to know, otherwise I will instruct him on his need to give his personal financial situation. I don't think that bears on the issues in the case.

MR. GRIMSLEY: Then instruct him not to answer.

MR. KERSTEN: I will so instruct him unless you can tell me what conceivable relevance it has and I am happy to consider that right now.

MR. GRIMSLEY: The conceivable relevance is if he can predict interest rates, like he's saying others in the past should have done, or did in fact do, he would be an incredibly wealthy man. He's not incredibly wealthy.

MR. KERSTEN: You have asked that question and he has answered it. What I want you to do is tell me the relevance of his giving his personal

financial situation --

MR. GRIMSLEY: Instruct him not to answer then.

MR. KERSTEN: -- and I will be happy to instruct him that he can answer if you give me any suggestion why that's relevant.

MR. GRIMSLEY: I gave you what it is. If you want to instruct him not to answer on the basis of what I've told you, then do so.

MR. KERSTEN: If you have nothing more to say on its relevance, then I instruct you not to answer as to your own personal financial net worth. Basically that's what he seems to be asking here, and he refuses -- defense counsel refuses to tell me any conceivable bearing that might have on the issues in the case. So I tell you, you need not answer and should not answer any questions dealing with your own personal net worth.

BY MR. GRIMSLEY:

Q You're aware, sir, that there are other policies besides life policies that Northwestern Mutual sells, including short-term annuities such as the CRA?

A I'm not even sure how you would describe that. I'm aware of that they have other policies, yes, sir.

Q You're familiar with something called the current

1 rate annuity?

2 A Yes, sir.

3 Q That's a product that Northwestern Mutual began

4 selling as of 1985?

5 A That's correct.

6 Q People have actually bought that policy?

7 A I believe so.

8 Q Does that suggest to you that some people have

9 preferences for instruments that allow for short-term

10 interest rate investments?

11 A I did not analyze that product, so I'm not sure how

12 that product was set up, only that it was different

13 than the Pre-MN annuitants.

14 Q Do you know anything about how that product was set

15 up in terms of the terms of the current rate annuity?

16 A I know something; but, again, I didn't analyze it.

17 Q Do you know whether, in fact, it's actually a

18 participating policy?

19 A I'm not sure if it is.

20 Q But you do know that it's actually pegged to

21 short-term interest rates?

22 A I'm not sure that it is.

23 Q You have no knowledge whatsoever sitting here today?

24 A As I say, I looked at that policy years ago and I

25 don't recall precisely nor does it impact on my

1 analysis today.

2 Q Do you think it would be interesting to know whether

3 there are putative class members who actually

4 purchase the CRA?

5 A It's irrelevant to my analysis.

6 Q You don't find it relevant that some people have

7 purchased an annuity product that is actually pegged

8 to short-term interest rates at the same time as

9 holding the Pre-MN annuity?

10 A Absolutely not.

11 Q Look at the second bullet point, please. It says,

12 "To indicate whether the methodology could be applied

13 to all Pre-MN annuity policyholders on a common basis

14 using a mechanical calculation." What did you mean

15 by that?

16 A That whether a methodology would be applicable to

17 individuals and whether it would be a fair and

18 reasonable representation of any difference and to

19 indicate whether that methodology would encompass any

20 subtleties product to product, whatever.

21 Q What do you mean by "subtleties product to product"?

22 A Any specific difference that might exist between one

23 policyholder's policy and another.

24 Q What differences between various policies of the

25 putative class members did you take into account in

1 coming up with your opinions in this report?

2 A All of them.

3 Q What in your mind is "all of them"?

4 A In my mind "all of them" means all of them. I was --

5 We looked at various policies, we looked at

6 distinctions that may exist or might exist or

7 whatever, and we incorporated them into our

8 methodology.

9 Q You are aware that there are three different types of

10 annuity policies that are held by the putative class

11 members, namely something called an FPA, or a

12 flexible premium annuity; a single premium retirement

13 annuity, or an SPRA; and a retirement annuity, an RA?

14 A You're throwing out terms that I would have to review

15 specific notes or review my analysis to determine if

16 your exact representation is accurate and

17 all-encompassing. I am aware that those type of

18 differences were precisely what I was just talking

19 about when I said whether a common methodology would

20 apply to different kinds of policies.

21 Q Is there anyplace in your report that you can point

22 to where you discuss whether or not there are, in

23 fact, differences that are relevant to your analysis

24 between the three different types of policies I just

25 asked you about?

1 A Yes.

2 Q Where?

3 A Several places in my report I say that I am providing

4 the answer to the question that counsel provided to

5 me, which is, could a common methodology apply across

6 the entire Pre-MN annuitant group, and I conclude

7 that the common methodology in fact does apply to all

8 such policies. So what I'm saying is that yes I have

9 considered differences, and I am telling counsel that

10 I can opine positively that the methodology laid out

11 in my report encompasses all such of those policies.

12 Q But you understand the report is one of the only

13 things I get to see that reveals the analysis that

14 you provided, so I'm asking you about what the

15 differences are that you identified and why you

16 determined that those differences were not relevant

17 for purposes of the actual answer you came up with,

18 okay?

19 A I developed a methodology and looked at every

20 difference that I could surface with and see within

21 policies and responded to counsel via this report

22 that this is the methodology that encompasses all

23 Pre-MN annuitant policies reasonably.

24 Q What specific differences between policies did you

25 look at and consider in coming to the opinions set

1 forth in your report?

2 MR. KERSTEN: Counsel, just as moment. I
3 object as to the ambiguity, and I have a feeling
4 you're not -- there is an ambiguity that you may not
5 be aware of.

6 MR. GRIMSLEY: George, please -- literally,
7 please, just object to form.

8 MR. KERSTEN: I am. I'm objecting to the
9 ambiguous form of that question.

10 BY MR. GRIMSLEY:

11 Q You said that you had identified differences between
12 the policies and you made a determination that with
13 regard to the opinions in your report those
14 differences did not matter; correct?

15 A That is correct. This methodology encompasses those
16 differences and treats them fairly.

17 Q What specific differences did you identify and
18 analyze to come to your conclusion that such
19 differences would not matter to the conclusions set
20 forth in your report?

21 MR. KERSTEN: Same objection as before.

22 THE WITNESS: Well, you have surfaced in
23 your previous question with certain types of
24 policies. That certainly is a difference which I
25 considered. Another difference, which is shown in

1 the report, is that there might be from policy to
2 policy a different policy loan rate. That's a
3 difference between policies. And the analysis and
4 the formula says that difference needs to be adjusted
5 for in the formula, and so throughout the report the
6 formula recognizes that difference between policies.

7 The report also specifies that there
8 is a substantive difference between policies as to
9 whether the policyholder has accepted or agreed to
10 direct recognition, which is a technical term that we
11 have defined throughout this case, or not, and the
12 formula calculates differently for those -- that
13 difference in policies. So I analyzed and considered
14 as many differences as were able to surface among
15 policies and policyholders, certain of which is
16 specified in the report, a call for an adjustment in
17 the formula.

18 MR. KERSTEN: Counsel, just so you're
19 aware, that was the ambiguity I was concerned with
20 that has now been clarified.

21 BY MR. GRIMSLEY:

22 Q You identified a few differences that you did take
23 into account in your report, some of which didn't
24 find their way into the methodology because you said
25 they didn't need to and some of which did. Are there

1 any other differences between the various policies or
2 policyholders that you took into account and analyzed
3 in this matter before coming to the opinions in your
4 report?

5 A Well, there is differences in perhaps expenses, and
6 that's talked to in the report, and that is
7 reasonably reflected in the formulas. So we
8 certainly looked to -- we -- I certainly looked to
9 whatever differences existed, and in my opinion I
10 have considered and analyzed each of those
11 differences and I'm opining positively to counsel
12 relative to the question asked of me, that this
13 mechanical methodology that I have developed applies
14 appropriately and reasonably and fairly to all Pre-MN
15 annuitants.

16 Q You have mentioned that there were different types of
17 policies, meaning flexible premium annuity, a single
18 premium retirement annuity, and retirement annuity;
19 and you took that into account you say. You took
20 into account the different interest rates on
21 borrowing. You took into account whether a policy
22 had direct recognition or not. You said you also
23 took into account you said expenses. Are there any
24 other differences you took into account?

25 A Again, I -- what I did was review as much as is

1 possible regarding the Pre-MN annuitant group, what
2 kinds of policies, what differences there were, and
3 certainly considered any such difference in
4 developing the methodology that I have laid forth
5 here, and in reviewing whether I would be able to
6 opine positively to counsel relative to the question
7 asked of me.

8 Q Sir, I'm just asking what other differences can you
9 think of between the policies or policyholders that
10 you took into account before coming to your ultimate
11 opinions in this report?

12 A Literally every difference that I could surface with,
13 that I was told about, that I saw via extensive
14 review of documents in this case, so I believe I have
15 considered every such difference.

16 Q Can you list any other differences other than the
17 ones that you have actually testified about?
18 Specific differences.

19 A Off the top of my head, no. My work in this regard,
20 as to what exactly the difference between policies in
21 the Pre-MN group go back several years, is when I
22 started looking at those policies and reviewing them.
23 So I believe I'm aware of the differences that do
24 exist to the extent there are any, but it was not
25 done within the one month period prior to issuing

1 this report, so I can't cite other specifics off the
2 top of my head, no.

3 Q Now, we talked about prospective relief for in-force
4 policyholders. For those policyholders that are
5 putative class members but have surrendered or
6 otherwise terminated their policies as of today's
7 date, what would you call the relief you're
8 calculating for them?

9 A That relates to the third question or third bullet of
10 Paragraph 6 that counsel asked if that same
11 methodology could quantify a difference for those
12 policyholders which were in the initial class but are
13 no longer in force, and my answer to that third
14 request of Plaintiffs' counsel was positive, that the
15 same methodology would apply, it will calculate a
16 difference at the time of termination between the
17 amounts accrued for each individual or group of
18 policyholders compared to what I believe would be
19 fair and equitable treatment but for, and that's the
20 term that we have defined, but for the 1985 change.

21 Q In your mind with regard to those putative class
22 members that have terminated or surrendered their
23 policies, would the relief be damages?

24 A The difference is the term I'm using. And, again,
25 we're talking this distinction between a legal and a

1 dictionary definition.

2 Q That's why I asked in your mind.

3 A Certainly in my mind, using the dictionary definition
4 of damages, that would be a part of damages.

5 Q What other part of damages would there be for the
6 individuals who have surrendered or terminated their
7 policy?

8 A Well, I could use as an example, if an individual
9 policyholder terminated in 2005, what I have
10 quantified and what this methodology quantifies is
11 how much additional funds they should have received
12 in 2005, but in fact they did not receive any
13 additional funds, so clearly this difference is
14 applicable to 2005. The Court may decide, someone
15 else may decide, that since it was not paid in 2005,
16 if it is paid in 2013, there is an interest
17 differential, that's beyond the scope of my report.

18 Q You did nothing to determine on a class-wide basis
19 what the interest differential would be for
20 individuals in the putative class who have
21 surrendered or terminated their policies?

22 MR. KERSTEN: Objection, ambiguous as to
23 form.

24 THE WITNESS: I believe that's correct,
25 sir.

1 BY MR. GRIMSLEY:

2 Q Are there any other parts of damages that you can
3 think of besides the accumulated difference indicated
4 in the third bullet point in Paragraph 6 for
5 individuals who have terminated or otherwise
6 surrendered their policies?

7 A Again, you're throwing out that term, and I keep
8 saying I'm not sure how you're using it, in my
9 definition of the dictionary term "damages" or a
10 legalese perspective, and I'm not --

11 Q And that's fair enough.

12 A I'm trying to answer as best I can, but you keep
13 asking the same thing and I keep saying there is two
14 levels.

15 Q That's fair enough. In your definition. And earlier
16 in response to one of my questions on this issue,
17 using your definition, you said the accumulated
18 difference would be part of damages. So given your
19 understanding of damages, not the legal definition,
20 you then testified that interest might be another
21 component?

22 A Might be, that's correct, sir.

23 Q Is there some other component of damages that you can
24 think of given your definition of damages that would
25 not be included in the accumulated difference for

1 individuals who terminated or surrendered their
2 policies?

3 A I'm not an attorney, but I have been involved in
4 litigation situations certainly, and there may or may
5 not be punitive damages or costs. There is -- you
6 know, it gets to be a determination made by the
7 courts, not by my analysis.

8 Q So you just mentioned also there are punitive damages
9 and potentially costs. Is there any other part of
10 damages given your definition of damages that you can
11 think of that would not be included in the
12 accumulated difference?

13 A Offhand, from my definition, I'm not aware. I
14 realize that this I believe is a basis -- a
15 difference which is certainly part of damage.

16 Q But other than the accumulated difference, you did
17 not actually in your report take into account any of
18 those other parts of damage?

19 A That is correct, sir.

20 Q Look at Paragraph 8, please.

21 A (Witness complies.)

22 Q And the fourth line at the end says, "The data needed
23 to perform the formulaic calculations is readily
24 available to NML and requires no additional data from
25 Pre-MN annuity policyholders." What is the data

needed to perform the formulaic calculations specifically?

A Well, again, I'm indicating in the sentence directly above your question that it can be applied to individual Pre-MN annuitants or specified groups. So the answer to your question, to be specific, which of those two do you -- are you questioning or are interested in?

Q On a class-wide basis, what particular data would be needed to apply your formula so as to fairly compensate in your mind the Pre-MN annuitants?

MR. KERSTEN: Objection as to the ambiguity, and if you want I can describe what I mean by that.

MR. GRIMSLEY: No.

MR. KERSTEN: You don't want to know?

MR. GRIMSLEY: No, I don't.

MR. KERSTEN: I object to the ambiguity of the form of the question.

THE WITNESS: Well, as stated, the formula recognizes whether each Pre-MN annuitant would be in either a direct recognition or a non-direct recognition category; would have any loan rate or policy loan rate, either 5, 6 or 8 percent, because the formula differentiates among those things; and

also to apply the formula, cash values and cash transactions would need to be known.

So cash values certainly should be readily available, cash transactions certainly should be readily available, and they would include deposits, withdrawals, policy loans, repayment of policy loans. Whatever cash transacts between the company and these Pre-MN annuitants.

Q One of the pieces of data that you would want is when certain premiums were actually paid; correct?

A Yes, that's part of the cash transactions. So if a policyholder deposited an amount of money, how much and when would be a necessary value to apply the formula properly.

Q And you would not only want to know what year the premium was paid, you would want to know when in that year the premium was paid in order to apply the formula properly?

A No, that's not correct. As shown in the report, for purposes of simplicity and for purposes of understandability, we took all transactions as of the end of the policy year and applied the formula, and the formula works perfectly well under that basis, which is cash transactions defined by year. It also states within the report that if more refined

information were available, such as cash transactions at specific dates, the same formula would apply equally well to that additional information and provide a reasonable and reliable value for difference under that scenario as well. So the formula is the same, the value is equally reliable under each and could be applied under either scenario.

Q Is it true, however, that the accumulated difference in an account would be greater if you assume the premium was deposited at the beginning of the year rather than at the end of the year as your model assumes?

A Yes, sir, that is accurate.

Q So your model, if anything, comes up with a damages number that is lower than in your mind the real damages number would be?

A It comes up with a reasonable, reliable value for difference, not damage, for difference which in my opinion is conservatively stated, yes, sir.

Q In your -- Does that mean that your model is really an estimate of the accumulated difference rather than the actual accumulated difference in the "but-for" world?

A Yeah, there is -- it certainly is a reliable

representation and it is a reasonable and accurate estimation of that difference.

Q But if you applied your model to the class, there are members of the class who would actually receive less money than they would if you took into account the actual dates of premium deposits rather than assuming that all of them occurred at the end of the year?

A We have shown it in the example within the report on an end of year basis and state that that is a conservative estimate. If -- And we indicate in the report, I indicate, that if more detailed information were available, such as precise dates of cash transactions, that the reasonable and reliable and accurate estimation would in fact likely increase somewhat.

Q Do you know whether anyone on behalf of Plaintiffs' counsel has informed the class members that the damages model you have adopted is conservative in nature, meaning that it doesn't account for the actual date of the premium deposit?

A I have no idea what counsel has discussed with class members.

Q Have you discussed it?

A But my methodology, I will underscore, is a reasonable, reliable, and accurate representation of

1 the difference for policyholders.

2 Q Have you --

3 A And is conservative relative to that one estimate or

4 one aspect of cash transaction.

5 Q Have you personally asked any of the putative class

6 members whether they agree with your model?

7 A No, I have not.

8 Q Have you personally asked any of the class members

9 whether they agree with using a conservative approach

10 that might actually understate the amount of

11 accumulated difference for a particular class member?

12 A I have not; and I do not believe that a reasonable,

13 reliable, and conservative estimate understates as

14 that--that is not -- I think the process has shown

15 that we're using year-end values--gives a reliable

16 and accurate representation of the difference.

17 Q You said that your model could take account of actual

18 dates of premium deposits if that information were

19 available; correct?

20 A Of cash transactions of which premium deposits or --

21 whether you call them premium deposits, whatever, and

22 other cash transactions were to be identified on a

23 daily basis.

24 Q Let's assume that Northwestern Mutual does not have

25 the actual date of premium deposit for all premium

1 deposits for the entire class period. At that point,

2 in order to obtain that information, wouldn't you

3 need to ask the annuity holder him or herself?

4 A Absolutely not. You would certainly not need to ask

5 the individual policyholder. And I want to go to the

6 first part of your question, because it -- it applies

7 on a general basis as well. Northwestern does not

8 know. No insurance company knows the exact date of

9 transaction because, in fact, they do various

10 proximations or value adjustments themselves, such as

11 cash transacted in a week is reflected on a Friday.

12 Every company does that to some extent.

13 So the same thing applies within a

14 company. So if more detail comes about and if

15 Northwestern had such detail, this formula would

16 reflect it properly. And if they are limited to

17 providing information on an annual basis, this

18 formula reflects that properly. In either case, you

19 get a reliable accurate representation of the

20 difference.

21 Q Assume with me that Northwestern Mutual for the

22 entire class period does not, in fact, have even the

23 weekly deposit information for all of the annuity

24 policyholders. At that point, there is the

25 possibility that you could get better information on

1 the timing of deposits by going to each individual

2 class member. It's at least possible, isn't it, sir?

3 A For a particular individual, you could perhaps get

4 more accurate information. But as I state in my

5 report, it's really irrelevant to getting a

6 reasonable and accurate representation of the

7 difference.

8 Q Do you think it's possible that there are individual

9 policyholders out there that would want a court to

10 take into account more accurate information about the

11 date of premium deposits if that individual has that

12 information in his or her possession?

13 A I'm not sure how to answer that question. In any

14 class action I have ever seen, again, speaking as a

15 non-attorney, just from my own awareness, class

16 members are always allowed to go outside any

17 arrangement and calculate or proceed on an individual

18 basis, but I do not see why in this instance that

19 would be of any value to any individual policyholder.

20 Q You have not actually talked, however, to any

21 individual policyholder about that issue?

22 MR. KERSTEN: Objection, repetitious and

23 irrelevant.

24 THE WITNESS: No, I have not.

25 (Exhibit No. 4 was marked for

1 identification.)

2 BY MR. GRIMSLEY:

3 Q I'm showing you what is being marked as Deposition

4 Exhibit No. 4. This is the Plaintiffs' motion in

5 support of it's -- Well, this is Plaintiffs' motion

6 for an order redefining the class that was filed with

7 the federal court in this case. Do you recognize

8 this?

9 A Yeah, I do not believe I have seen this before.

10 Q I just want to ask you about the class definition.

11 And you will see on the first page, there is a

12 definition of the proposed class. Do you see that?

13 A Yes, sir.

14 Q Have you been provided or have you seen previously

15 the proposed definition of the class?

16 A I have not seen, I have been told.

17 Q Please read this definition and let me know if it is

18 consistent with the proposed definition that you have

19 been provided.

20 A I believe this is what I have been told.

21 Q As defined there, would the class include individuals

22 who had Pre-MN annuity policies in force as of

23 March 31st, 1985 but who terminated or otherwise

24 surrendered their policies prior to 1993?

25 A There is a Section B which excludes certain people.

1 And to the extent they do not fall in Section B, it
2 would include those people that terminated prior to
3 1993.

4 MR. GRIMSLEY: We have been going for about
5 an hour, a little over, if you want to take a break.
6 It's up to you.

7 MR. KERSTEN: Sure. Could you give us a
8 guesstimate or speculative guesstimate of how long
9 we're going to go today?

10 MR. GRIMSLEY: You know what, it's going to
11 depend on the answers that are given. My questions
12 are relatively short --

13 MR. KERSTEN: Well, I realize that.

14 MR. GRIMSLEY: Well, when the answers are
15 three paragraphs long it definitely changes the --

16 MR. KERSTEN: Well, assume that, just give
17 me a reasonable --

18 MR. GRIMSLEY: I would say it would be six
19 to seven hours if the answers remain this long. If
20 they don't, it will be much shorter.

21 MR. KERSTEN: So you're talking 3:00, 3:30,
22 something like that? We want to know because we want
23 to confirm travel plans.

24 MR. GRIMSLEY: I don't think so, unless you
25 want to have him each lunch while he's giving the

1 deposition. I think it will be more like 4:30, 5:00.

2 MR. KERSTEN: Let's do the best we can to
3 keep it 3:00 to 3:30 if you can; okay?

4 MR. GRIMSLEY: Talk to him. It will go
5 much more quickly.

6 MR. KERSTEN: He's pretty damn responsive,
7 and maybe as things go on you will realize that I'm
8 actually trying to expedite things by suggesting
9 things are ambiguous because I think some of the
10 questions that you asked might encompass a couple
11 different situations. That's always been my concern.

12 MR. GRIMSLEY: All right. Take a break.

13 THE VIDEOGRAPHER: Going off the record at
14 10:12 a.m.

15 (Off the record.)

16 THE VIDEOGRAPHER: We're back on the record
17 at 10:22 a.m.

18 BY MR. GRIMSLEY:

19 Q Do you recall in the State Court part of this case
20 that you provided an opinion during trial that
21 Northwestern Mutual should have given notice to its
22 policyholders of the 1985 change?

23 MR. KERSTEN: Objection as irrelevant and
24 the question goes to something that's already been
25 adjudicated and beyond the scope of this deposition.

1 Go ahead and answer.

2 THE WITNESS: That has nothing to do with
3 my current report, but I do -- I do remember that
4 that was a topic of issue.

5 BY MR. GRIMSLEY:

6 Q You say it had nothing to do with your current
7 report. Did you do anything at all with regard to
8 your current report to determine what actions
9 policyholders would have taken in the "but-for" world
10 had Northwestern Mutual provided notice of the 1985
11 change?

12 A Policyholders did not exist in the "but-for" world.
13 The "but-for" world is a theoretical concept used to
14 define a current difference. So it's -- I have no
15 idea, and it's irrelevant to my conclusions, any
16 actions they might have taken in such world. They
17 did not live in that world.

18 Q But you have not done any analysis for purposes of
19 this report of what policyholders would have done in
20 a world in which they had received notice of the 1985
21 change?

22 A I have done no analysis in that regard.

23 Q You have also done no analysis in your report of what
24 policyholders would have done if Northwestern Mutual
25 had provided notice and sought their consent to the

1 1985 change?

2 A I have not done such analysis.

3 Q Were you asked by counsel to do such an analysis of
4 whether -- of what the "but-for" world would look
5 like if Northwestern Mutual had given notice of the
6 1985 change?

7 MR. KERSTEN: Do you mean other than this
8 financial difference that he's analyzed?

9 THE WITNESS: You know, I developed the
10 "but-for" world as the basis for my methodology, so
11 counsel did not ask me to do anything in that world.
12 It's simply a world used to develop a difference.

13 BY MR. GRIMSLEY:

14 Q Did counsel ask you to develop a model for a
15 "but-for" world in which Northwestern Mutual had
16 given notice to policyholders and asked for consent
17 to the 1985 change?

18 A Again, the "but-for" world is my definition, so
19 counsel did not ask me anything about such an
20 environment.

21 Q Counsel did not ask you to perform any analysis of
22 what policyholders would have done had they been
23 notified of the 1985 change?

24 A Not for purpose of this report.

25 Q And counsel for purposes of this report did not ask

1 you to do any sort of analysis of what policyholders
2 would have done had they been notified of the change
3 and asked for their consent?
4 A Not for purposes of this report.
5 Q You have, though, testified before that Northwestern
6 Mutual in your opinion should have given notice of
7 the 1985 change?
8 MR. KERSTEN: Well, repetitious; but,
9 again, irrelevant here and --
10 THE WITNESS: That was not my opinion.
11 This is -- You're relating to not this report, but
12 work done a couple of years ago on this case, and I
13 would not agree with your characterization that I in
14 any way opined that they should have notified them of
15 the change. I don't agree with that.
16 BY MR. GRIMSLEY:
17 Q Is it your opinion that Northwestern Mutual was not
18 under an obligation to notify its policyholders of
19 the 1985 change?
20 A That's correct, because the notification should have
21 been done before the 1985 change, so they should not
22 have notified policyholders that we made a change.
23 That was improper and I would never agree with that.
24 So notification was important, but I was talking
25 years ago in an earlier part of this case about

1 notification before a change, not of the change.
2 Q Okay. Have you done anything with regard to this
3 report to determine what policyholders would have
4 done had they been notified that Northwestern Mutual
5 was going to make the 1985 change?
6 A That has no bearing on this report.
7 Q Did counsel ask you to in any way analyze what
8 policyholders would have done had Northwestern Mutual
9 provided them with notice that Northwestern Mutual
10 was going to implement the 1985 change?
11 A Paragraph 6 specifies what counsel asked me, and
12 that's not in Paragraph 6, so they did not ask me
13 that. They did not ask me anything other than what's
14 in Paragraph 6.
15 Q So you have not developed a model for determining on
16 a class-wide basis with common proof what
17 policyholders would have done had Northwestern Mutual
18 notified those policyholders of the 1985 change
19 before Northwestern Mutual implemented that change?
20 A There is a lot in that question. You used a legal
21 term in the middle of it. I'm not sure how to
22 respond to that question.
23 Q Well, you said, sir, that you have developed a model
24 for determining the accumulated difference on a
25 class-wide basis; correct?

1 A On a class wide and an individual basis, that is
2 correct, sir.
3 Q Have you done anything to determine on a class-wide
4 basis what Northwestern Mutual annuity policyholders
5 would have done if Northwestern Mutual had given them
6 notice of the 1985 change before Northwestern Mutual
7 implemented that change?
8 A Yes, I --
9 MR. KERSTEN: Objection as repetitious. Go
10 ahead and answer.
11 THE WITNESS: I have done analysis of that,
12 and that was done not for purposes of this report but
13 as part of my involvement at least two years ago.
14 BY MR. GRIMSLEY:
15 Q But there is nothing in this report on that question?
16 A That's correct, that didn't happen and does not
17 impact this report.
18 Q So you said you did something before on this issue.
19 Did you previously, before this report, analyze and
20 provide a model for determining on a class-wide basis
21 what Northwestern Mutual annuity policyholders would
22 have done had they been notified of the 1985 change
23 before it was implemented?
24 A Analyze, yes, more than two years ago. Provide a
25 model, no.

1 Q You did not provide an opinion as to what every
2 single putative class member would have done had they
3 received notice of the 1985 change before it was
4 implemented?
5 A No one can provide an opinion as to what, quote,
6 every single policyholder would do in any situation.
7 Q You did not provide an opinion as to what the
8 majority of policyholders would do if Northwestern
9 Mutual had notified them of the 1985 change for
10 implementing that change?
11 A That cuts closer to what I did do prior to testimony
12 more than two years ago, or two years ago, and so I
13 did do some analysis in that regard.
14 Q What analysis, sir?
15 MR. KERSTEN: Objection --
16 THE WITNESS: Precisely what I did two
17 years ago, I don't recall.
18 MR. KERSTEN: Objection as irrelevant and
19 beyond the scope of this -- beyond the proper scope
20 of this deposition.
21 BY MR. GRIMSLEY:
22 Q Did you at any point provide an opinion that one
23 could determine on a class-wide basis what
24 individuals who own Northwestern Mutual policies
25 would have done had Northwestern Mutual notified them

of the 1985 change before implementing that change?

MR. KERSTEN: Same objection as before.

THE WITNESS: I have the same answer as before, which is no one can opine as to what every policyholder would do in any situation, let alone notification of the '85 change, so I certainly did not do that regarding every individual.

BY MR. GRIMSLEY:

Q But did you attempt to do it on a class-wide basis?

MR. KERSTEN: Objection as to the ambiguity of the word "it" and absorbing the earlier question, which is equally ambiguous and also irrelevant; but go ahead, Bob, do the best you can.

THE WITNESS: What I did do, again, two years ago, was opine as to the propriety of making such an announcement to class members. That I did do.

BY MR. GRIMSLEY:

Q But you have not opined as to what class members would, in fact, have done if Northwestern Mutual had given notification prior to implementing the 1985 change?

A I was not asked to do that and I did not do that.

Q Do you think given your experience that different policyholders would have done different things if

they had been given notice of the 1985 change prior to its implementation?

A Different policyholders do different things in any situation, it has nothing to do with the 1985 change, and I have no opinion as to what an individual policyholder would do in any situation.

Q Now I want to ask you about your opinion from the earlier case that not only should Northwestern Mutual have notified policyholders before the change, but it should have sought consent. Do you recall giving that opinion?

A I provided opinions which were specified exactly, precisely, and reflected my analysis two years ago in my report, and I testified on that basis. I remember those topics being discussed, but I do not recall precisely and exactly what my opinion was, how I specified it in my report, and how I described it in court. However, I can tell you that the way I expressed it in my report and the way I expressed it in court is exactly the result of my analysis, so I have no new perspective to provide.

Q Have you at any point done anything to determine what class members would have done had Northwestern Mutual notified them of the 1985 change and sought their consent prior to implementing that change?

A I was never asked that question and I provided no opinions thereon.

Q Sitting here today, can you say with any confidence what each class member would have done had Northwestern Mutual notified them of the 1985 change and sought consent before implementing that change?

MR. KERSTEN: Objection as double in form and irrelevant. Beyond the scope -- proper scope of this deposition.

THE WITNESS: I would not opine as to what any particular class member would do in any situation, whether it be the 1985 change or any other situation.

BY MR. GRIMSLEY:

Q And why would you not opine as to that?

A Because it would be speculative and I could not opine as to what an individual would do, that's not within the scope of actuarial work.

Q Do you know or have an opinion on what types of different things various individuals would have done had Northwestern Mutual notified them of the 1985 change and sought consent before implementing that change?

A I have never analyzed that. I have no opinion thereon.

Q Do you think that different people might have done different things in response to notification and request for consent?

A I will say again, different people can do different things on any issue irrespective of the 1985 change, it has nothing to do with that. I have no opinion as to what an individual would do in a given situation.

Q Do you have any opinion as to what the class of people would have done?

A I was not asked that question, I did not analyze it, and I have no such opinion.

Q You're familiar with the 1983 update?

A Yes, sir.

Q You're familiar that Northwestern Mutual in that situation provided notice of the update and sought consent for the update?

A Yes, sir.

Q Did everybody who was notified and asked for consent agree to the 1985 update?

A No, sir.

Q Roughly how many people did not agree?

A I saw that information more than two years ago. I don't recall.

Q Was it a substantial percentage that did not agree, in your recollection?

1 A I do not think that's accurate, but I'm not sure what
2 the percentage is.
3 Q There were also individuals who consented to the 1983
4 change; correct?
5 A Yes, sir.
6 Q How many individuals consented to the 1983 change?
7 A I certainly do not know how many.
8 Q Do you have a rough sense of what percentage of the
9 individuals consented to the 1983 change?
10 A I did more than two years ago when I reviewed that,
11 but I do not recall at this time.
12 Q Well, you did as part of your report look at
13 individuals who had direct recognition versus
14 individuals who did not; right?
15 A That is correct.
16 Q Individuals with direct recognition are the ones that
17 actually agreed to the 1983 update; correct?
18 MR. KERSTEN: Objection as ambiguous as to
19 form.
20 THE WITNESS: I believe so.
21 BY MR. GRIMSLEY:
22 Q So what percentage of individuals, given that you
23 have been looking at that issue for this report, have
24 direct recognition?
25 A For purposes of this report, it's irrelevant what

1 percentage. This report says that the formulaic
2 mechanical approach needs to reflect the difference;
3 and whatever percentage it is, the formula and the
4 methodology here will reflect it and it's irrelevant
5 what percentage it is.
6 Q You said that different policyholders in your
7 experience may do different things. Do you recall
8 that?
9 A That's not my experience, that's fact.
10 Q Does your model take into account the fact that
11 different policyholders may have done different
12 things in the "but-for" world?
13 MR. KERSTEN: Objection as irrelevant. Go
14 ahead.
15 THE WITNESS: Yes, it does, because there
16 was no "but-for" world and hence policyholders could
17 make no decisions in it because they were not in it.
18 It is simply a theoretical process used to determine
19 a current difference or a difference at time of
20 termination, but it did not exist. So I do have an
21 opinion, and the opinion is that since policyholders
22 were never in that world, they could make no
23 decisions within that world.
24 BY MR. GRIMSLEY:
25 Q Did you do anything to determine what policyholders

1 likely would have done had they been in a world in
2 which Northwestern Mutual never made the 1985 change?
3 MR. KERSTEN: Objection as repetitious.
4 THE WITNESS: They weren't in the world so
5 I didn't even consider what they may have done in a
6 place that they were never in.
7 BY MR. GRIMSLEY:
8 Q Your model that determines the accumulated difference
9 does not take into account the different things that
10 annuity policyholders would have done in a "but-for"
11 world in which Northwestern Mutual never made the
12 1985 change?
13 MR. KERSTEN: Objection as without
14 foundation, repetitious, and multiple in form.
15 THE WITNESS: Yes, it does reflect what
16 they would have done. And since I know they did not
17 exist in that world, they could have made no decision
18 other than what they did do because they were never
19 in the position to make such decision.
20 BY MR. GRIMSLEY:
21 Q Just to be clear, though, is it your opinion that if
22 Northwestern Mutual had never implemented the 1985
23 change, every single class member would have made the
24 same premium investments at the same time and
25 borrowed the same amount at the same time and

1 surrendered their policies at the same time as they
2 did in the actual world?
3 MR. KERSTEN: Objection as without
4 foundation and multiple as to form.
5 THE WITNESS: If the change had not been
6 made, policyholders would have behaved in a different
7 manner.
8 BY MR. GRIMSLEY:
9 Q Your model does not account for the fact that
10 policyholders would have behaved in a different
11 manner if the 1985 change had never been made?
12 A Yes, it does account for that by quantifying a
13 difference which is the result of the action of
14 Northwestern Mutual in implementing the 1985 change.
15 Q Go to Paragraph 20 of your report, sir.
16 A (Witness complies.)
17 Q It says, "The cash value of a Pre-MN annuitant's
18 account at any point in time is based on the history
19 of cash deposits, expense charges, policy loans,
20 withdrawals, and the history of DIRs used to
21 determine policyholder dividends credited to the
22 account." Do you see that?
23 A Yes, sir.
24 Q And do you stand by that statement today?
25 A Absolutely.

1 Q You assume in your model that in the "but-for" world
2 the cash deposits made by the various class members
3 would have been made at the same time and for the
4 same amounts as they were made in the actual world;
5 correct?

6 A I'm assuming that because it's a fact. So cash
7 transactions were factual, so the facts of the matter
8 are the facts of the matter and that's what I used.

9 Q If, however, Northwestern Mutual had never
10 implemented the 1985 change, would you have any
11 reason to believe that the cash deposits would have
12 been of the same amount and at the same time as they
13 were in the actual world?

14 A They would certainly not have been.

15 Q The second item you mention is expense charges. What
16 do you mean there by expense charges?

17 A I mean charges for expenses.

18 Q That's an actuarial term?

19 A That's a definition out of the dictionary.

20 Q What is your definition of it?

21 A Charges made by the company for expenses, to cover
22 expenses.

23 Q And those charges can change over time?

24 A It's possible, but many of them are defined within
25 the policy.

1 Q What type of expense charges can change over time?

2 A Well, I specified in the report charges applicable to
3 deposits for the class representative did change over
4 time, so that would be an example of how they can
5 change.

6 Q You are aware that there is something called the
7 expense experience factor class?

8 A That's a term -- I would have to see it. That's not
9 a defined term. It could be defined by Northwestern.
10 I don't recall it as specific to that.

11 Q Do you recall having testified that prior to the 1985
12 change Northwestern Mutual placed Pre-MN annuities
13 and life insurance policies in a different expense
14 experience factor class?

15 A That's correct.

16 Q What types of expenses can, in your opinion, a mutual
17 insurance company take into account in determining
18 the appropriate value to assign to an expense
19 experience factor class?

20 A They can put into expense factors whatever they feel
21 like, literally, and write that into their policy and
22 a policyholder can either agree to that or not. But
23 what goes into an expense charge can reflect many
24 areas, such as administrative expense, profit,
25 contingencies, risks. It can vary, but it's

1 developed and analyzed by the company, and the
2 policyholder either can agree to that by buying a
3 policy or not.

4 Q Is it your testimony that every consideration that
5 goes into assigning a value to an expense experience
6 factor class has to be set forth in the policy
7 agreement itself?

8 MR. KERSTEN: Objection as beyond the
9 proper scope of this deposition. Answer as best you
10 can, if you understand the question.

11 THE WITNESS: A policy can state whatever a
12 policy states. It's just a legal agreement. One
13 policy to another can provide for expenses in many
14 different ways. It can be a fixed rate, it can be a
15 rate that can change by year based on experience, but
16 it's specified in the policy. So there is a wide,
17 wide range of possibilities to how a company can
18 charge expenses to policyholders.

19 BY MR. GRIMSLEY:

20 Q What I'm asking, though, is whether in your opinion
21 every single consideration that a mutual insurance
22 company takes into account in assigning a value to an
23 expense experience factor class has to be set forth
24 explicitly in the policy itself?

25 A There is two parts to your question. You said in

1 assigning a value. If the policy indicates that the
2 assigning of a value will be determined based on
3 experience each year, then the assigning of value is
4 not determined at the time the policy is written.
5 If, in fact, on the other hand within the policy
6 there is a specified value which will be applicable,
7 then it is determined at the time. So it can or
8 cannot be and it's a function of the individual
9 policy.

10 Q With regard to the Pre-MN annuity policies that are
11 at issue in this case, do those Pre-MN annuity
12 policies specify expressly what type of expenses will
13 be taken into account in assigning a value to the
14 experience factor class?

15 A There is about four parts to that question; and if we
16 can take them piecemeal, there is different answers
17 to different things. You said is it expressly -- I
18 don't even -- Could you read the question back and we
19 will do it piecemeal, because there is a lot in
20 there.

21 MR. KERSTEN: Before this is done, I do
22 object to the question as multiple in form, and I
23 think it's also beyond the proper scope of this
24 deposition.

25 (The following question read aloud by

reporter: With regard to the Pre-MN annuity policies that are at issue in this case, do those Pre-MN annuity policies specify expressly what type of expenses will be ...)

THE WITNESS: Okay. The answer to that, no.

(The following question read aloud by reporter: "Taken into account in assigning a value to the experience factor class?")

THE WITNESS: Assigning a value, yes.

BY MR. GRIMSLEY:

Q How, with regard to assigning a value, is it expressly set forth in the policies that are at issue in this case?

A In the policies in this instance it specifies in the policy what those charges will be. Now, I have already provided you an example for Ms. LaPlant of how those values did change over time, but they were expressly quantified, not specified as to what it covered, but specifically quantified in her initial policy.

Q Given that the expense-related considerations were spelled out in Ms. LaPlant's policy, how could the expenses change from year to year?

A Well, as indicated in the report, Ms. LaPlant's

policy called for a 10 percent expense charge on deposits. After some duration, Northwestern began charging 6 percent on such deposits. They did so, to my knowledge, without any notice, but I'm not aware of whether there was one or not; but it was strictly in the benefit of Ms. LaPlant and any other comparable policyholders, so clearly no policyholder would take exception to that change from the value that was specified in her policy to what was actually charged.

Q Would the expense charges have been the same as they were in the actual world for Pre-MN annuity policyholders if Northwestern Mutual had never implemented the 1985 change?

A I'm sorry, could you read the question?

(Question read aloud by the reporter.)

THE WITNESS: Yes.

BY MR. GRIMSLEY:

Q And why do you say that?

A Because they were specified in the policy.

Q You mentioned, however, that there were changes made to the policies that were different, although better than what was specified in the policy?

A I cited an example of one such incidence.

Q Can you say with certainty that there would not have

been other changes like that in a world in which Northwestern Mutual had not implemented the 1985 change?

A I have no opinion in that regard.

Q The next item you identify in Paragraph 20 is policy loans?

A Yes, sir.

Q Did you assume that in your "but-for" world the dates and amounts of policy loans would have been the same for each class member as they were in the actual world?

A Yes, I did, because those are the facts of the transactions.

Q Did you do anything to determine what the dates and amounts of policy loans would have been in a world in which Northwestern Mutual had not made the 1985 change?

A No, I did not.

Q Do you have any reason to believe that the dates and amounts of policy loans in a world where Northwestern Mutual made the 1985 change -- Strike that.

Do you have any reason to believe that the dates and amounts of policy loans in a world in which Northwestern Mutual had not made the 1985 change would have been the same as in the actual

world where it did?

A I did not analyze that and I have no such opinion. I have no opinion one way or the other.

Q Do you think it's likely that at least some of the policy loan dates and amounts would be different in a world in which Northwestern Mutual had not made the 1985 change?

A Absolutely.

Q The next item that you identify -- And did you take into account in your model the fact that policy loan dates and amounts would have been different in a world in which Northwestern Mutual did not make the 1985 change in coming up with your opinions in this report?

A I did not because that did not exist.

Q The next item is withdrawals. Did you assume for purposes of your model that the withdrawals in the "but-for" world would have been for the same amount and at the same date as withdrawals in the actual world?

A I did because those are the facts of those transactions.

Q Do you have any reason to believe that the withdrawals would have been on the same date and for the same amount in a world in which Northwestern

1 Mutual had not implemented the 1983 change as in
 2 the -- 1985 change as in the actual -- Let me start
 3 that over.
 4 Do you have any reason to believe that
 5 withdrawals would have been for the same amount and
 6 on the same date in a world in which Northwestern
 7 Mutual had not made the 1985 change as the actual
 8 world in which it did implement that change?
 9 A I can assure you they would be different.
 10 Q Did you take into account the fact that they would be
 11 different in coming up with your model that is set
 12 forth in your report?
 13 A Yes, I did, in saying that the "but-for" world is a
 14 nonexistent world. Transactions are facts, and the
 15 methodology appropriately reflects those facts.
 16 Q But you do acknowledge that if --
 17 MR. KERSTEN: Objection as argumentative in
 18 form by the use of the word "but."
 19 BY MR. GRIMSLEY:
 20 Q Are you an economist, sir?
 21 A No, I'm not.
 22 Q Have you ever been asked to calculate damages in a
 23 particular case?
 24 A Yes, sir.
 25 Q In what circumstance?

1 A Many.
 2 Q Any other than the actuarial situation or insurance
 3 situation?
 4 A That I am an actuary and I deal in insurance and
 5 healthcare, so other than the field in which I --
 6 which I act, I have not provided any testimony.
 7 Q Have you ever provided an opinion on damages in a
 8 case involving financial products?
 9 A Yes, sir.
 10 Q What types of financial products?
 11 A I have provided opinions, court documents, and
 12 testified on the basis of the term damages--and,
 13 again, I define that in a dictionary sense of the
 14 word--on numerous occasions.
 15 Q Do you consider yourself an expert on damages as that
 16 term is legally defined?
 17 A I don't define anything legally, and I have no
 18 opinion as to the legalese of a situation. I respond
 19 to requests of me and perform analysis and -- and
 20 render opinions.
 21 Q In fact, sir, you're not comfortable testifying about
 22 what the legal definition is of damages, are you?
 23 A That's absolutely correct.
 24 Q Have you ever before this matter held yourself out as
 25 an expert on calculating damages on a class-wide

1 basis?
 2 MR. KERSTEN: I object to the use of the
 3 word "class-wide" in that context because there is an
 4 ambiguity in the form, but not by counsel. Do the
 5 best you can to answer.
 6 THE WITNESS: Okay. I have provided court
 7 testimony using the term "damages" in insurance and
 8 healthcare situations on more than fifteen occasions.
 9 BY MR. GRIMSLEY:
 10 Q Have you ever developed a model for calculating
 11 damages on a class-wide basis prior to this opinion?
 12 MR. KERSTEN: Same objections as before.
 13 Do your best.
 14 THE WITNESS: Numerous times.
 15 BY MR. GRIMSLEY:
 16 Q What were those times?
 17 A I can't recall specifically all them, but I certainly
 18 remember some of them.
 19 Q Was that always on the plaintiff's side?
 20 A No.
 21 Q Have you ever testified that a party could not
 22 calculate damages on a class-wide basis in a
 23 particular case?
 24 A The fact that I was testifying as to damages would be
 25 only those instances where damages could be

1 quantified, so I don't recall those other situations.
 2 Q Have you ever in the context of a motion for class
 3 certification provided a damages model for
 4 calculating damages on a class-wide basis?
 5 A Yes, sir.
 6 Q And what was that situation?
 7 A Many such situations.
 8 Q Can you give me one?
 9 A I could give you one that was -- you know, cases are
 10 I guess public information after they go to court,
 11 but I certainly quantified damages using one such
 12 example regarding Prudential and the vanishing
 13 premium type policies.
 14 Q Was that in the context of a motion for class
 15 certification?
 16 A Yes.
 17 Q Any other examples besides that one?
 18 A More than 25.
 19 Q And have those all been on the side of the plaintiff?
 20 A No.
 21 Q So have you ever in any circumstance testified that a
 22 party could not, in fact, calculate damages on a
 23 class-wide basis?
 24 A I'm sorry, read the question.
 25 (Question read aloud by the reporter.)

THE WITNESS: I have not so testified. I have come to that conclusion and discussed those situations with counsel. Such as this instance they asked me a question, I analyzed it, responded to counsel that in this instance I could do that. In some instances I would be asked by counsel can you do a certain thing. I would review that certain thing and conclude that no mechanical process could be used and that would be the end of my involvement, so it's not a testifying situation.

BY MR. GRIMSLEY:

Q But you said you had testified for defendants in the context of class certification motions?

A Yes.

Q In the context of class certification motions, have you ever provided an opinion on the defense side that damages could not be quantified on a class-wide basis?

A I do not recall testifying to that extent.

Q Have you ever prepared a report in which you expressed such an opinion?

A Very possibly. I don't recall offhand.

Q Back to Paragraph 20, if you would, sir. The last item that you identify as relevant to determining the cash value of an annuitant's account at any point in

time is the history of DIRs. Do you see that?

A Yes, sir.

Q You assumed that in the "but-for" world the DIR for the Pre-MN annuitants would be the same as the life rate DIR?

A For those Pre-MN annuitants who opted for direct recognition and did not have a policy loan or for that portion of their business that did not take a policy loan.

Q For the other putative class members, what did you assume with regard to the but-for DIR?

A When you say for the other class members, I'm translating that into being those class members who did not take direct recognition and take several pages to describe or to quantify or show what the appropriate and reasonable DIR is for those individuals, but that's spelled out in my report.

Q But for purposes of those calculations for those other individuals, did you start with the life rate DIR and then make adjustments accordingly?

A I started with the opinion that the life rate DIR for individuals that opted for direct recognition is a reasonable benchmark and an appropriate value to use for those individuals and the numerical quantification applicable to those policyholders that

did not opt for direct recognition is a function of that value, yes, sir.

Q Do you have any reason to believe that the history of DIRs would have been the same in a world in which Northwestern Mutual had never implemented the 1985 change?

A Can you read the question, please?

(Question read aloud by the reporter.)

THE WITNESS: Well, the history of DIRs prior to 1985 was precisely what NML used, so that -- what they used prior to the change is what they used and hence that part of your answer -- the question is yes. After '85, then I would have to take a look at that, and I made no assumption as to what would be different.

BY MR. GRIMSLEY:

Q You have made no effort to quantify what the DIRs would have been after 1985 in a world in which Northwestern Mutual had not made the 1985 change?

A Well, that's precisely what I did do. The "but-for" world is saying that the DIRs would likely have been the but-for DIRs as represented in this report if the 1985 change had not taken place. That's precisely what I did answer.

Q That is an assumption you're making about the DIRs in

the "but-for" world?

A No, that's the result of my analysis and the application of this formula.

Q Did you make any efforts to actually calculate what Northwestern Mutual would have done with regard to the portfolio rate DIR in a world in which Northwestern Mutual had not implemented the 1985 change?

MR. KERSTEN: Objection as repetitious.

THE WITNESS: For the Pre-MN annuitants, that's precisely what I'm quantifying in this report.

BY MR. GRIMSLEY:

Q Did you make any effort to determine whether Northwestern Mutual would have altered the general portfolio rate DIR --

MR. KERSTEN: Same objection.

BY MR. GRIMSLEY:

Q -- if Northwestern Mutual had not made the 1985 change?

MR. KERSTEN: Same objection.

THE WITNESS: The portfolio rate DIR is the portfolio rate DIR. Certainly their actions every year are going to impact that result, but they did what they did and I used what they did. So those are, again, facts of the matter, so I didn't alter or